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Successions - Collation - Prescription

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the judge, nor any exception save the two statutory ones.[17] The effect of this nonsuit cannot deprive the defendant of his rights to prosecute either his demand in reconvention, or whatever the court may call a defense analogous thereto.

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SUCCESSIONS — COLLATION — PRESCRIPTION — Plaintiff brought this suit to obtain collation to the succession of his grandmother. Defendant, a daughter of the de cujus, filed a plea of prescription of five years under Article 3542[1] of the Civil Code. *Held,* Article 3542 deals with the *reduction of excessive donations* and is not applicable to collation. As only seven years had elapsed since plaintiff's emancipation it was not necessary to decide if the prescription of ten years on personal actions[2] was properly urged. *Himel v. Connely,* 197 So. 424 (La. 1940).

The unanimous opinion of the court stated, "We do not know of any case in which the prescription of five years was applied to a suit for collation."[3] Several months before this decision, in the case of *Naudon v. Mauvezin,*[4] this same court had expressly applied the five year prescription herein urged to an action for collation. Thus, the *Naudon* case must be considered as overruled by the instant case, even though it was apparently overlooked by the court. It is regrettable that some disposition of the *Naudon* case was not made in the opinion. Nevertheless, the decision in the instant case appears eminently correct.

Until recently there had been virtually no decisions on the prescription of collation. *The Succession of Waterman,*[5] in 1936, clearly indicated that the action for collation would be pre-

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(1935) said "it is clear that article 491 of the Code of Practice, when read in connection with its context, related to a judgment on its merits, a final judgment deciding all the points in the controversy between the parties, and not to an interlocutory judgment, which does not decide on the merits. . . ."

17. See notes 3(2) and 4, supra.

1. Art. 3542, La. Civil Code of 1870: "The following actions are prescribed by five years:

"That for the nullity or rescission of contracts, testaments or other acts.

"That for the reduction of excessive donations.

"That for the rescission of partitions and guarantee of the portions.

"This prescription only commences against minors after their majority."

2. Art. 3544, La. Civil Code of 1870: "In general, all personal actions, except those before enumerated, are prescribed by ten years."

3. Himel v. Connely, 197 So. 424, 428 (La. 1940).

4. 194 La. 739, 194 So. 766 (1940).

5. 183 La. 1006, 165 So. 182 (1936).

scribed in five years after the death of the parent, under Article 3542. Prior to that, only one case[6] even touched on the subject; it simply stated that the action for collation was not barred by the prescription of one year.

The reference in the opinion to the possibility of applying the ten year prescription of Article 3544 of the Civil Code does not seem worthy of serious consideration. True, this prescription is a catch-all, but the peculiar nature of the action for collation should be ample cause for removing it from the sphere of Article 3544. As pointed out by many of our leading cases, collation is merely an incident to the partitioning of the succession.[7] Based on this line of reasoning, the rule in France is that the action for collation continues so long as the action for partition of the succession exists.[8]

Should Louisiana adopt the French rule,[9] one heir could demand collation of another as long as they own the succession in common.[10] After a partition of the succession, the prescription for the rescission of partitions would apply if there were error or fraud in collation.[11] But a limitation on the idea that the action for collation must be brought as an incident to partition was established in an early case.[12] The court held that if the only asset of the succession is a sum due as collation, an heir may bring a direct action in the district court for the amount due him, without the necessity of a partition. This limitation is both reasonable and equitable, as it avoids a circuity of action.

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6. Champagne v. Champagne, 125 La. 408, 51 So. 440 (1910).

7. Benoit v. Benoit's Heirs, 8 La. 228 (1835); Dupuy v. Dupont, 11 La. Ann. 226 (1856); Lamotte v. Martin, 52 La. Ann. 864, 27 So. 291 (1899); Mitcham v. Mitcham, 160 So. 145 (La. App. 1935).

8. Cass. req. novembre 1849, Dalloz 1849.1.286. 9 Baudry-Lacantinerie et Wahl, Traité Théorique et Pratique de Droit Civil (3 ed. 1905) 367, nº 2944; 5 Huc, Commentaire Théorique & Pratique du Code Civil (1893) 443, 455, nºs 366, 734; 10 Laurent, Principes de Droit Civil Français (2 ed. 1876) 650, nº 590. Baudry-Lacantinerie, while pointing out that this is the law in France, states that collation should have a separate prescriptive period.

9. As a matter of fact, dictum in two older cases states this to be the Louisiana rule. See Succession of Couder, 46 La. Ann. 265, 272, 14 So. 907, 909 (1899); Sibley v. Pierson, 125 La. 478, 518, 51 So. 502, 515 (1910).

10. Art. 1304, La. Civil Code of 1870: "The action of partition can not be prescribed against, as long as the thing remains in common, and such community is acknowledged or proved.

"Thus, though coheirs have enjoyed their hereditary effects in common for an hundred years and more, without making a division, any of them can, at any time, sue for a partition."

11. Art. 1413, La. Civil Code of 1870: "Suits for the rescission of partitions are prescribed by the lapse of five years from the date thereof, and in case of error and fraud, from the day in which they are discovered."

See also Art. 3542, La. Civil Code of 1870.

12. Benoit v. Benoit's Heirs, 8 La. 228 (1835).

In the opinion of the writer, a logical analysis of the action for collation would result in the acceptance of the French view—that the action for collation stands or falls with the right to partition. The results of the *Naudon* case and the instant case would be unchanged under this doctrine.[18]

W. M. S.

TRADE MARKS AND TRADE NAMES—INFRINGEMENT BY MARK ON HEAT-RESISTING GLASSWARE—GOODS OF SAME "CLASS"—Plaintiff, a manufacturer of glass bottles, had applied the trade mark "Rex" to prescription bottles sold to druggists since 1896. This mark was registered in 1900 and re-registered in 1927. Since 1915 the defendant has used the mark "Pyrex" on many articles of glassware made of heat-resisting glass, but has never manufactured prescription bottles. In 1922 defendant began to manufacture nursing bottles which it sold under the mark "Pyrex," registered for nursing bottles in 1924. A few years thereafter, plaintiff applied its mark "Rex" to nursing bottles made from ordinary glass. Plaintiff seeks an injunction based on his prior registration and use of the term "Rex." The lower court found that there was an infringement and enjoined defendant from using the trade mark "Pyrex," not only upon nursing bottles, but upon all glassware,[1] and the defendant appeals. *Held,* the lower court erred in its findings and plaintiff's bill should be dismissed. *Corning Glass Works v. Obear-Nester Glass Company,* 113 F. (2d) 956 (C.C.A. 8th, 1940).

Under Section 16 of the Trade Mark Act of 1905,[2] the ex-

13. In the *Naudon* case there had been a partition more than five years preceeding the action for collation. Thus, under the French view, the action would have been barred because the action for partition had prescribed. But the court was emphatic that this was not the basis of its decision, for it said, "A claim for collation, or reduction of an excessive donation inter vivos, is prescribed by Article 3542 of the Revised Civil Code by the lapse of five years from the death of the donor. . . ." Naudon v. Mauvezin, 194 La. 739, 742, 194 So. 766, 767 (1940). The court went on to say that the "right of action lapsed in January," which was five years from the death of the donor, but less than five years from the partition.

There had been no partition in the instant case.

1. Plaintiff based its claim for injunction solely upon the alleged infringement of the statutory trade mark. There was no claim of unfair competition, unfair practices, nor fraud.

2. Act of Feb. 20, 1905, 33 Stat. 724 (1905), 15 U.S.C.A. § 96 (1934). Section 16 provides: "Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade mark and affix the same to merchandise of substantially the same description properties as those set forth in the registration, . . . shall be liable to an action for damages. . . ."